IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE JURISDICTION

APPEAL FROM ORDER NO.841 OF 2005

Zambad Constructions House Pvt. Ltd..Petrs

vs

Shri Sunil Sagarmal Sankhala .. Respondent

Mr.A.V.Anturkar with Mr Avinash Avhad and Mr.Milind Heblikar for Petrs

Mr.A.S.Kumbhakoni with Mr T.D.Deshmukh for the Respondent ..

CORAM : B.H.MARLAPALLE, J

DATE: 26th September, 2005

P.C.

1. Heard Mr Anturkar with Mr Avinash Avhad learned counsel for the petitioners/original defendants and Mr.Kumbhakoni with Mr Deshmukh learned counsel for the respondent/original plaintiff.

2. Admit. Respondent waives service.

3. Appeal is taken up for final hearing forthwith, as it arises from the interlocutory order below the application at Exhibit 5, for temporary injunction passed on 6th July, 2005 by the learned Civil Judge, Sr.Division, Pune.

4. Special Civil Suit No. 156 of 2005 came to be filed by the plaintiff on or about 1st February 2005 seeking specific performance of the agreement purportedly signed on 23rd October, 2003 at Pune and for restraining orders by way of temporary injunction from changing the nature of the suit property by development/construction or alienation. In the alternative damages have been prayed for Rs.1,69,29,000/- with interest at 18 % p.a. An application at Exhibit 5 came to be filed with following prayers:

> " The defendant no. 1 be restrained by an order of temporary injunction from changing the nature of the suit property causing construction thereon developing the same and/or transferring selling, alienating and/or creating any third party interest in the suit property or any part or portion thereof. "

5. The plaintiff admits that in the meeting held

on 23rd October, 2003 there were discussions between the parties in respect of the sale of the suit properties namely a plot of land admeasuring 57 Rs and forming part and parcel of survey no. 8 Hissa No.2B/2C of village Kharadi taluka Haveli District Pune. As per the plaintiff, defendant no. 1 through the defendant no.2 agreed to sell the suit property for development at the rate of Rs.297/- per sq.ft (total saleable area of 57,000 sq.ft) and an amount of Rs.5,00,000/- was paid on the same day. However, the defendants changed their stand subsequently and started developing the property sometime in January 2005. It is also contended that during the pendency of the suit property in March 2005 the development has been undertaken by another developer i.e. Soham Developers and not by the defendant no. 1 any more.

6. The learned Judge of the trial court noted that a meeting was held on 23rd October 2003 and payment of Rs.5,00,000/- was made and acknowledged. The property was standing in the name of defendant no.1, cheque of Rs.4,79,000/- was encashed and articles of memorandum of understanding were not

disputed and therefore the plaintiff had made out a prima facie case to grant temporary injunction.

7. Mr Anturkar the learned counsel for the defendants has referred to the written statement filed before the trial court in which it has been admitted that a meeting between the parties was held on 23rd October 2003 and the broad parameters were discussed. The said parameters were reduced in writing including the rate per sq. ft etc and steps to be taken by the respective parties. The writing of the MOU has also been admitted. Even then as per Mr Anturkar there was no finally concluded agreement for sale or the agreement for development of the suit property in favour of the plaintiff. It is not disputed that pursuant to the MOU dated 23rd October 2003 the plaintiff issued a public notice which appeared in the local newspaper on 29th October, 2003 but at the sametime there was no further response even as per the terms of the MOU for a long time and therefore the defendant no.1 proceeded to develop the property on its own and by obtaining building permission on 29th Janaury 2005 and subsequently during the pendency of the suit Commencement certificate has been

issued by the planning authority on 20th April 2005.

8. As per Mr Kumbhakoni, the learned counsel for the plaintiff when the terms of the MOU have been admitted the plaintiff was required to be protected and the trial court has rightly passed an order of injunction which is impugned in the appeal. He also submitted that the plaintiff is willing to deposit the entire amount of the agreed consideration and order of injunction be continued.

9. The MOU dated 23rd October 2003 as reproduced by the trial court stipulated the following broad parmeters agreed between the parties:

> a) Consideration of the property at the rate of Rs.297/- per sq ft and for total area of 57,000 sq.feet consideration amount came to Rs.1,69,29,000/-;
>
> b) a sum of Rs.5,00,000/- to be paid as and by way of earnest money before publishing the public notice ;
>
> c) a sum of to the extent of 30 % of the agreed consideration plus the same of Rs.5,00,000/- to be paid by the plaintiff on agreement;
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> d) a sum to the tune of 45 % of the total consideration to be paid within six months from the date of the agreement ;
>
> e) the balance amount of the agreed consideration to be paid after 9 months from

the date of the agreement ;

f) the defendant no.1 to be consented to public issue notice throug his lawyer ;

g) agreement to be executed within 3 months from the date of memorandum ;

h) defendant no.1 to comply for and obtain ULC clearance certificate, demarcation plan and Road acquisition certificate within 15 days from the date of public notice ;

i) the defendant no. 1 to provide for zone certificate and NOC of the suit property;

10. It was necessary for the trial court even for prima facie considerations to record a finding whether there was a concluded agreement between the parties or the agreement for sale/development. The MOU has been admitted cannot be even for prima facie consideration termed as a concluded agreement between the parties. Even otherwise the terms stipulated in the MOU as relied upon by the trial court were required to be considered for prima facie consideration and also to examine the issue of equities between the parties. There is nothing on record to show that the plaintiff had taken due steps for performance of his part of the contract and the defendants were not willing. The agreement was to be signed within 1 month from the date of MOU dated 23rd October 2003 and 30 % of the consideration amount was to be paid on signing the

agreement.

It is an admitted fact that out of the total consideration of Rs.1,69,29,000/- the plaintiff has not paid anything more than Rs.5,00,000/- even up to the time the suit was presented to the trial court. The MOU was signed on 23rd October 2003 and for both the year there was no progress nor did the plaintiff take any steps to comply with the terms of MOU. Granting blanket injunction at this stage when the property is under development and construction on the suit plot is in progress must be based on a strong prima facie case in favour of the plaintiff. Mr Kumbhakoni pointed out that in the written statement it was stated by the defendants that they are developing the property on their own and subsequently sometime in the month of March 2005 or end of March 2005 another developer has been brought in picture. Even if this is so,it would not effect the rights of the defendants vis-a vis the plaintiff emanating from the MOU. There is no dispute that the defendant is the owner of the property by way of auction sale and the planning authority has issued the permission for construction and commencement certificate in its

name. The plaintiff has also prayed for alternative relief in terms of damage and therefore there is no irreparable loss that is likely to be caused to the plaintiff even at this stage if construction or development was continued on the said property. The impugned order is practically without any reasoning and therefore it cannot be sustained. Mr Anturkar rightly relied upon the decision of this court in the case of Gajanan Narayan Malik & anr Kolte Patil Developers Ltd and others reported in 1999 (2) Bombay Cases Reporter 118.

11. In the result, this appeal succeeds. The same is hereby allowed. The impugned order passed below Exhibit 5 is hereby quashed and set aside. However, it is directed that the defendants shall notify the pendency of the suit while creating third party interests by any mode on the suit property. Trial of the suit is hereby expedited.

12. Mr Kumbhakoni learned counsel at this stage submitted an oral application to continue the injunction order passed by the trial court for sometime. Application is hereby rejected.

(B.H.Marlapalle, J)